No. 12472

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OHIO BRASS COMPANY, THE OHIO BRASS COMPANY, GENERAL ELECTRIC COMPANY, LAPP INSULATOR COMPANY, INC., THE PORCELAIN INSULATOR COMPANY, I-T-E CIRCUIT BREAKER COMPANY, A. B. CHANCE COMPANY, MCGRAW-EDISON COMPANY, H. K. PORTER COMPANY, INC.,

Appellants,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,

Appellee.

OPENING BRIEF FOR APPELLANTS.

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SOUTHERN CALIFORNIA EDISON COMPANY,

Appellee.

OPENING BRIEF FOR APPELLANTS.

I.
JURISDICTION

A. District Court.

This is an action to recover treble damages pursuant to section 4 of the Clayton Act (15 U. S. C. §15) in respect of injuries allegedly sustained by reason of alleged violations of section 1 of the Sherman Act (15 U. S. C. §1) [Complaint, par. 1; R. 8-9]. The Complaint alleges that "[e]ach defendant is an inhabitant of or is found or transacts business in the Southern District of California." [Complaint, par. 1; R. 9]. Jurisdiction over such an action is conferred upon the

United States District Court, Southern District of California, by the provisions of section 4 of the Clayton Act (15 U. S. C. §15) as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor *in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy,* and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Italics added.)

B. This Court.

This appeal is taken, pursuant to leave granted by this Court on February 11, 1963, from an interlocutory order of the United States District Court for the Southern District of California, Central Division dated and entered January 15, 1963 and entitled "Order Denying Motions (1) for Final Partial Summary Judgment, and (2) to Strike from Complaints" [R. 78]. Said order includes a certification by the district judge that he "is of the opinion that the foregoing order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation" [R. 80]. Jurisdiction to hear this appeal is conferred upon this Court by paragraph (b) of section 1292 of Title 28, United States Code, as follows:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order in-

volves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: . . ."

The respects in which the order to which this appeal relates complies with the requirements of said paragraph (b) of said section 1292, 28 U. S. C., are more completely set forth in the "Application to Take Appeal From Interlocutory Order of the United States District Court for the Southern District of California, Central Division, Pursuant to 28 U. S. C. §1292(b)" filed herein on January 25, 1963.

II.

STATEMENT OF THE CASE.

Question Involved. The sole question presented by this appeal is whether sections 4B and 5(b) of the Clayton Act (15 U. S. C. §§15b and 16(b)) are to be enforced according to their terms or are to be modified by the imposition of an exception to toll the period of limitation therein provided by reason of "fraudulent concealment".

Manner in which Question Raised. The Complaint consists of two "counts". "Count I" alleges in essence that "Beginning at least as early as 1948, and continuing thereafter at least until on or about the 17th day of February, 1960, the exact dates to plaintiff un-

known" defendants and others engaged in an unlawful combination and conspiracy in restraint of trade in insulators [Par. 7; R. 11]; that "During the period of said combination and conspiracy plaintiff purchased insulators from defendants" and paid therefor at least $9,313,299.00 [Par. 11; R. 15-16]; that "by reason of said combination and conspiracy the prices paid by [plaintiff] for insulators during said period exceeded the prices that would have been paid had said combination and conspiracy not been in existence" [Par. 11; R. 16]; that "by reason of said combination and conspiracy [plaintiff] suffered damage to its business and property at least in the amount by which the prices paid by it for insulators were excessive" [Par. 12; R. 16]; that plaintiff did not learn of said combination and conspiracy until the commencement of civil and criminal proceedings against defendants by the United States, and plaintiff could not have discovered the same at an earlier time

> "for the reason that the same was entered into by the defendants secretly and at all times during the continuation thereof the defendants . . . actively and fraudulently concealed the existence thereof and their participation therein . . . [listing certain alleged acts to that end]" [Par. 13; R. 16-17].

"Count II" of the Complaint [R. 17] is substantially identical to "Count I", incorporating most of its allegations by reference, except that it alleges that the period of the alleged combination and conspiracy was "Beginning at least as early as 1955 and continuing thereafter until on or about the 17th day of February,

1960" [Par. 15; R. 18] and that plaintiff's purchases of insulators from defendants during said period aggregated at least $4,724,173.00 [Par. 17; R. 18].

Defendants moved for final partial summary judgment, pursuant to Rules 54(b) and 56, Federal Rules of Civil Procedure, "as to all claims for relief based upon (a) any purchase made by plaintiff more than four (4) years prior to the date of the filing of the indictment by the United States as alleged in the complaint [February 17, 1960] . . . and (b) any damages claimed to have been sustained by such plaintiff to its business or property by reason of any such purchase" [Motions, p. 3; R. 44]. The grounds for that motion were that on the face of the Complaint all such claims were time-barred by the provisions of section 4B of the Clayton Act (15 U. S. C. §15b), as extended by section 5(b) of the Clayton Act (15 U. S. C. §16(b)) [Motions, p. 4; R. 45].

Defendants also moved concurrently, pursuant to Rule 12(f), Federal Rules of Civil Procedure, to strike from the Complaint

> "all allegations relating or referring to (a) any purchase made by plaintiff more than four (4) years prior to the date of the filing of an indictment by the United States as alleged in the complaint [February 17, 1960] . . . and (b) any damages claimed to have been sustained by such plaintiff to its business or property by reason of any such purchase . . . [and] all allegations relating or referring to concealment, fraudulent or otherwise, of the alleged combination or conspiracy . . ." [Motions, pp. 5-6; R. 46-47].

The theory of the motions was that plaintiff could recover, if at all, only such damages as it had sustained by reason of overt acts of defendants occurring within the appropriate period of limitations. Since the only damages alleged were those allegedly sustained by reason of paying too-high prices, it should follow that all overt acts of defendants in respect of purchases made by plaintiff prior to the statutory period were performed prior to such period, and that all claims for such damages would be barred. It will be observed that the motions did not purport to test the sufficiency of the allegations of "fraudulent concealment", the position of defendants being that no such principle could apply to toll the limitations period regardless of the particular allegations.

The question was fully briefed and argued by both sides, and on January 8, 1963, the district court made and entered its "Memorandum of Decision" [R. 56] holding in essence that "fraudulent concealment" would toll the statute of limitations and that defendants' motions should be denied [R. 77].

Pursuant to said "Memorandum of Decision", on January 15, 1963, the district court made and entered the "Order Denying Motions (1) for Final Partial Summary Judgment, and (2) to Strike from Complaints" [R. 78], from which this appeal is taken.

On January 25, 1963 defendants filed in this Court their "Application to Take Appeal from Interlocutory Order [etc.]". On February 11, 1963 said application was granted by this Court. The "Notice of Appeal [etc.]" was filed on February 14, 1963 [R. 81].

III.

POINTS TO BE RELIED ON BY APPELLANTS.

Appellants state that they intend to rely upon the following point on this appeal: The district court erred in holding that the period of limitation provided in sections 4B and 5(b) of the Clayton Act (15 U. S. C. §§15b and 16(b)) could be tolled by reason of alleged "fraudulent concealment".

IV.

SUMMARY OF ARGUMENT.

The district court was wrong. Fraudulent concealment will not toll the statute of limitations in sections 4B and 5(b) of the Clayton Act. Its order must be reversed and remanded either with instructions to grant defendants' motions or for further consideration in light of a correct understanding of the law applicable to sections 4B and 5(b). Defendants' argument on this appeal is based upon the following points:

A. The Ruling of the District Court Was Based on an Erroneous Premise.
   1. The District Court Failed to Distinguish Between Tolling in Fraud Cases and Tolling for "Fraudulent Concealment" in Non-Fraud Cases.
   2. The Supreme Court Cases Establish Only a Federal Doctrine of Undiscovered Fraud, No More.
   3. The Other Cases in the Federal Courts Do Not Establish a Federal Doctrine of Fraudulent Concealment.

V.

ARGUMENT.

The sole question presented for review is whether sections 4B and 5(b) of the Clayton Act (15 U. S. C. §§15b and 16(b)) should be enforced in accordance with their terms or whether the period of limitation therein provided should be extended by reason of "fraudulent concealment". The sections in question read as follows:

> "Sec. 4B. Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.
>
> "Sec. 5. . . .
>
> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

The district court phrased the problem and its conclusion thus:

> "The pivotal issue which is determinative of defendants' motions is one of statutory construction: *i.e.,* is Section 4B to be construed so as to allow its four-year limitation period to be tolled by fraudulent concealment?" [R. 59].
>
> "It is the opinion of this Court that the federal doctrine of fraudulent concealment applies to Section 4B of the Clayton Act and that concealment of the conspiracies as here alleged will suspend the running of that statute of limitations." [R. 61].

The opinion of the court below (as well as those of the four Courts of Appeals which have ruled similarly) was based essentially upon the following reasoning:

1. Congress must have intended that its statute would be interpreted in accordance with existing doctrines.

2. There is a well-established federal doctrine which tolls statutes of limitation in cases of fraudulent concealment.

3. There is nothing in the statute itself or in its legislative history which shows affirmatively that Congress intended that the fraudulent concealment doctrine *not* apply.

4. Therefore, Congress intended the fraudulent concealment doctrine to apply to section 4B of the Clayton Act.

5. The arguments of appellants, being inconsistent with the foregoing, lack merit.

Although that reasoning has surface plausibility, it breaks down upon analysis of the authorities, for the authorities will not sustain the existence of a federal

doctrine of fraudulent concealment. We shall demonstrate in this section (1) that there is a well-established federal doctrine that in actions *based on fraud* the statute of limitations will not commence to run until plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the fraud; (2) that Congress specifically rejected proposals that the tolling doctrine applicable to *fraud* cases be made applicable to antitrust *conspiracy* cases; (3) that the federal authorities cannot be extended to create or support a doctrine of fraudulent concealment applicable to *non-fraud* actions; and (4) that therefore the reasoning of the court below is erroneous and cannot sustain its conclusion.

In the second portion of our brief, we shall analyze the 1955 amendments to the Clayton Act (including section 4B), applying established principles of statutory construction to demonstrate that section 4B must be enforced according to its terms. That analysis proceeds substantially as follows: (1) the language of the statute indicates that it should be enforced according to its terms; (2) the limitation of section 4B limits the right created by section 4, and the period of limitation may not be tolled on any grounds not expressed in the statute; (3) the legislative history indicates that the plight of the plaintiff who was unable to discover his cause of action was fully considered, and no provision was made for his benefit; (4) the objects and purposes of the 1955 amendments are inconsistent with a tolling of section 4B on grounds not expressed therein; and (5) that therefore section 4B should be enforced according to its terms without any implied tolling exception.

A. The Ruling of the District Court Was Based on an Erroneous Premise and Is Wrong.

1. The District Court Failed to Distinguish Between Tolling in Fraud Cases and Tolling for "Fraudulent Concealment" in Non-Fraud Cases.

The basic error of the district court was its failure to distinguish between (a) the tolling doctrine applicable in cases based on fraud, *i.e.,* that the limitation period will not begin to run until plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the fraud which is the basis of his suit, and (b) the doctrine of fraudulent concealment applicable in some jurisdictions to cases not based on fraud, *i.e.,* that "the fraudulent concealment by the defendant of the facts upon the existence of which the cause of action depends tolls the statute, and such statute does not begin to run until the discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts" (*Kimball v. Pacific Gas & Elec. Co.,* 220 Cal. 203, 215, 30 P. 2d 39, 44 [1934]).

Both of these doctrines are applicable in California, and the distinction between them is clearly recognized in the California law. The doctrine of tolling until discovery in fraud cases (sometimes called "the doctrine of undiscovered fraud") is specifically made applicable by statute: Code of Civil Procedure section 338, subdivision (4), provides a three-year statute of limitations for

> "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The "doctrine of fraudulent concealment" applicable in cases not based on fraud was most clearly and completely enunciated by the California Supreme Court in *Kimball v. Pacific Gas & Elec. Co., supra.* In that case, plaintiff was injured in the course of his employment by a person who he believed was a fellow servant but who in fact had been loaned by the common employer (P. G. & E.) to, and was then in the employ of, another (G. E.). Plaintiff therefore had a cause of action against G. E., and P. G. & E. had a cause of action against G. E. for reimbursement for its expenses by way of workmen's compensation paid to plaintiff. The facts as to the employment were kept concealed from plaintiff, and P. G. & E. and G. E. agreed that G. E. would reimburse P. G. & E. for one-half of its workmen's compensation expense. Plaintiff's action (eventually against G. E. alone) was commenced more than the statutory period after the cause of action accrued, but less than the statutory period after plaintiff's discovery of the facts as to employment. The court held that the defendant's conduct constituted a fraudulent concealment of the facts constituting the basis of plaintiff's claim sufficient to toll the statute of limitations until those facts were discovered. In the course of its opinion, the court made the following statements, which assist materially in the definition of the rule it was applying:

> "[I]ndependent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until discovery . . ." (220 Cal. at 210, 30 P. 2d at 42).

"[A]s far as a legal action for personal injuries is concerned, the fraudulent concealment by the defendant of the facts upon the existence of which the cause of action depends tolls the statute, and such statute does not begin to run until the discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts." (*Id.* at 215, 30 P. 2d at 44).

"We think that there was no duty on either company to volunteer the facts of the accident to plaintiff, but we think that when they began to negotiate between themselves as to the settlement of the claim, a positive duty existed to disclose those negotiations to plaintiff. Mere silence on the part of the two companies would not constitute, under well-settled principles, a fraudulent concealment, but when negotiations took place as to a settlement of the claim, a positive duty to disclose arose [based on an interpretation of section 26 of the Workmen's Compensation Act]." (*Id.* at 217, 30 P. 2d at 45).

The court also found it significant that employees of G. E. and P. G. & E. had talked freely with plaintiff about the accident, but had carefully concealed the facts with respect to employment, and, quoting from 12 Ruling Case Law, page 310, section 71, the Court said:

" 'Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and

> fair disclosure. To tell half a truth has been declared to be equivalent to the concealment of the other half. A partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect it is.'" (*Id.* at 219, 30 P. 2d at 46).

Thus, the rule of the *Kimball* case is that concealment by the defendant of the facts upon which plaintiff's cause of action is based, under circumstances which impose an affirmative duty to disclose such facts, will toll the California statute of limitations until plaintiff discovers, or in the exercise of reasonable diligence should have discovered, such facts. It will be observed that the controlling elements are (a) concealment by defendant of the facts and (b) circumstances imposing a duty of disclosure upon defendant.

It is unnecessary for present purposes to develop the fraudulent concealment doctrine, as applied by the California courts, to its full extent. Our purpose at present is simply to demonstrate that it is not the same as the doctrine of undiscovered fraud and to point out a few of the significant distinctions between the two doctrines to facilitate analysis of the federal authorities. Some significant distinctions are these:

Undiscovered fraud	Fraudulent concealment
Applies *only* to cases based on fraud.	Applies to non-fraud cases.
No concealment required.	Concealment by defendant of the facts essential.
No special duty to disclose required.	Duty of defendant to disclose the facts essential.

On the other hand, several similarities between the doctrines make them subject to ready confusion. Both doctrines operate to toll the statute until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the facts on which his cause of action is based. In applying either doctrine, acts of concealment by defendant may be significant in determining whether plaintiff should have discovered the facts. Under both doctrines, knowledge by plaintiff of the wrong will defeat the tolling. Of course, the similarity between the words "fraud" and "fraudulent concealment" tends to further enhance the likelihood of confusion.

Nevertheless, this Court, in applying California statutes of limitation, has recognized that the doctrine of undiscovered fraud (as embodied in C.C.P. §338[4]) and the doctrine of fraudulent concealment are not one and the same, but are separate and distinct.

In *Foster & Kleiser v. Special Site Sign Co.,* 85 F. 2d 742 (9th Cir. 1936), *cert. denied,* 299 U. S. 613, 57 Sup. Ct. 315 (1937), an action for treble damages under section 7 of the Sherman Act, this Court, in discussing California limitation of actions principles, said:

> "Appellee's present contention is that the applicable statute of limitations is section 338, subd. 4, Cal. Code Civ. Proc., which provides that an action for relief on the ground of fraud or mistake shall not be deemed to have occurred until the discovery by the aggrieved party of the facts constituting the fraud or mistake, and not by section 338, subd. 1, supra, which was pleaded by appellant. Appellee's contention is that although that statute

by its terms applies only to actions for relief from fraud or mistake, the California decisions hold it also applicable to cases where there has been fraud in the concealment of the existence of a cause of action, whether the cause of action itself be based on fraud or not. It cites in support of this proposition of law the following decisions of the California Supreme Court: Kane v. Cook, 8 Cal. 449; Kimball v. P. G. & E., 220 Cal. 203, 30 P. (2d) 39; Lightner Min. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093.

"The Supreme Court of California, in a decision more recent than any other of those cited above, has clarified the matter. In Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P. (2d) 39, supra, it was held that 'the three-year period provided for in section 338, subdivision 4, of the Code of Civil Procedure, applies only where fraud is the gravamen of the original action.'

"It also held that, 'independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until discovery, and that upon discovery the statute applicable to that particular action * * * then commences to run.' Under that decision when fraud is not the gravamen of the action, in order to toll the applicable statute of limitations, two factors must be present: (1) Fraudulent concealment; (2) nondiscovery, that is, absence of facts that would put a party upon notice of the cause of action. Mere ignorance of the injury complained of, or of the facts constituting

such injury, will not prevent the running of the statute. Lightner Min. Co. v. Lane, supra. See, also, Kimball v. P. G. & E., supra, 220 Cal. 203, 30 P. (2d) 39, 43. See, also, our decisions as to California law in Sacramento Suburban Fruit Lands Co. v. Johnson (C.C.A.) 36 F. (2d) 935, citing the general rule stated in 37 C.J. 939; Sacramento Suburban Fruit Lands Co. v. Lindquist (C.C.A.) 39 F. (2d) 900; Sacramento Fruit Lands Co. v. Tipper (C.C.A.) 36 F. (2d) 941. The evidence does not show that appellant fraudulently concealed its monopolistic activities, but clearly shows that appellee had knowledge of sufficient facts to put it upon notice of these activities, and of its resultant damage." (85 F. 2d at 751-752).

The foregoing in no way involved *federal* principles, but was based on the entirely reasonable premise that if a California statute of limitations was to govern the time to sue on a federal right, then California law should govern which statutory period applied and what tolling principles, if any, would be used in its application.

This Court also distinguished between tolling in actions based on fraud and tolling for fraudulent concealment in *Burnham Chemical Co. v. Borax Consolidated Ltd.,* 170 F. 2d 569 (9th Cir. 1948), *cert. denied,* 336 U. S. 924, 69 Sup. Ct. 655 (1949), and *Robison v. Sidebotham,* 216 F. 2d 816 (9th Cir. 1957).

2. The Supreme Court Cases Establish a Federal Doctrine of Undiscovered Fraud, But No More.

The Supreme Court cases cited by the District Court in its opinion (and by plaintiffs in their briefs below) clearly establish a federal doctrine of undiscovered

fraud, *i.e.,* that statutes of limitation applicable to federal causes of action *based on fraud* will be tolled until plaintiff discovers or in the exercise of reasonable diligence should have discovered the fraud which is the foundation of his suit. Those cases have nothing to do with any "fraudulent concealment" doctrine. This may be demonstrated by a consideration of those cases, in chronological order, and an analysis of the facts, holding, and discussion in each of them.

The first Supreme Court case to apply the doctrine of undiscovered fraud to a cause of action under federal law was *Bailey v. Glover,* 21 Wall. (88 U. S.) 342, 22 L. Ed. 636 (1874). That was an action by an assignee in bankruptcy to set aside as fraudulent and void certain conveyances which had been made by the bankrupt to members of his family, without consideration, with intent to take the benefit of the Bankruptcy Law, and for the purpose of defrauding his creditors. The assignee did not discover that such conveyances had been made until after the statute of limitations had, by its terms, run. The court stated the federal rule, and its holding, thus:

> "[W]e hold that when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to the party suing, or those in privity with him." (21 Wall. [88 U.S.] at 349-350, 22 L.Ed. at 639).

The foregoing is the classic statement of the undiscovered fraud rule. The essentials of the *Bailey* rule

are (a) an action based on fraud and (b) non-discovery of the fraud by a diligent plaintiff—neither active concealment of the facts nor a duty to disclose the facts is required. As noted above, the *Bailey* rule is entirely different from the *Kimball* rule, which requires both of the latter and does not require that the action be based on fraud. Thus *Bailey* did not enunciate the "doctrine of fraudulent concealment" as a federal rule—it announced a special federal rule applicable to actions *based on fraud,* the "doctrine of undiscovered fraud".

Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382 (1884), was an action by an assignee in bankruptcy to recover certain money and property transferred by the bankrupt to defendant in fraud of creditors. The assignee did not discover the fact of the transfers until after the statute of limitations applicable to suits by him had, by its terms, run. The court said:

> "These averments [to avoid the statute of limitations] are in substance that Carney, the bankrupt, and Rosenthal, the [defendant], kept concealed from the [assignee] the payments of money and transfers of property charged in the petition, and that the [assignee] did not obtain information of said matter until November 29, 1879, when, for the first time, they were disclosed to him and brought to his knowledge. The judgment of the circuit court, by which it was held that these averments excused the failure to bring the suit within two years after the cause of action accrued, is sustained by the opinion and decree of this court in the case of *Bailey v. Glover,* 21 Wall. 342." (4 Sup. Ct. at 384).

Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155 (1885), was an action by the assignee of a trustee in bankruptcy to recover from the wife of the trustee in dissolution of a corporation the value of certain stock in that corporation which she had, by devious means and through undisclosed agencies, purchased from the bankrupt estate following (a) misrepresentations by her husband (as her agent) to the trustee in bankruptcy as to the value of the stock and (b) concealment of the facts with respect to the value of the stock and the transactions in connection therewith. The court held that "The case is substantially the same, so far as the question now in hand [tolling the statute of limitations] is concerned, as that of *Bailey v. Glover,* 21 Wall. 342." (6 Sup. Ct. at 158). The court also set out the quotation from *Bailey* which we reproduced at page 19, *supra.* (*Ibid.*) Although the court used the words "fraudulent concealment" in its discussion (in connection with whether plaintiff should have discovered the fraud) it is evident that the court was applying the *Bailey* rule—tolling for undiscovered fraud.

Exploration Co. v. United States, 247 U. S. 435, 38 Sup. Ct. 571 (1918), was an action by the United States to cancel coal land patents which had been procured by fraud. The government did not discover the facts until after the applicable statute of limitations had, by its terms, run, at which time the participants in the fraud talked freely about it. The District Court found specifically that the defendants had *not* actively concealed the facts which constituted the fraud. The court discussed and relied upon *Bailey v. Glover* to hold that the statute of limitations was tolled until the fraud was discovered. The court, both in terms and on the

facts, was applying the *Bailey* rule—tolling for undiscovered fraud.

United States v. Diamond Coal & Coke Co., 255 U. S. 323, 41 Sup. Ct. 335 (1921), was an action by the United States to cancel certain coal land patents procured by fraud, and for other relief incidental thereto, which was brought long after the applicable statute of limitations had, by its terms, run.

> "The [trial] court, not questioning that in an adequate case the fraud and the concealment thereof would suspend the operation of the statute until the discovery of the fraud [citing *Exploration*], based its conclusion upon the qualifications and limitations inhering in that rule, as stated in the Exploration Case and as previously expounded in Bailey v. Glover [citation omitted]. Concluding that the averments of the bill were insufficient to establish that the failure to discover within the statutory time was not solely attributable to laches, and finding the bar of the statute under these circumstances absolute, the court applied the statute and dismissed the bill." (*Id.* at 332, 41 Sup. Ct. at 337.)

The Supreme Court held that the trial court had drawn unauthorized inferences from the facts alleged with respect to whether the government should have known of the fraud at an earlier time and remanded the case for further proceedings. The Supreme Court described the applicable rule as "the equitable principle arising from the fraud and its discovery" (*Id.* at 333, 41 Sup. Ct. at 337), and it was apparent that the court viewed concealment as relevant only to the determination of whether the government *should have discovered the*

fraud at an earlier time. The rule discussed and applied was that of *Bailey*—tolling for undiscovered fraud.

Holmberg v. Armbrecht, 327 U. S. 392, 66 Sup. Ct. 582 (1946), was an action in equity to enforce the statutory liability of shareholders under the Federal Farm Loan Act against one Bache, who had formerly owned shares in a defunct bank, but who had transferred the same to one Armbrecht for the purpose of concealing his ownership thereof and avoiding the statutory liability. In effect, it was an action to set aside a fraudulent conveyance and to impose statutory liability on the true owner of the stock. The trial court held that the New York statute of limitation was inapplicable to a suit in equity to enforce a federal right and that plaintiff was not barred by laches, giving judgment for plaintiff. The Court of Appeals reversed, holding that the New York statute of limitations applied and constituted an absolute bar. The Supreme Court reversed the Court of Appeals, holding that the New York statute did not apply and remanding the case to the Court of Appeals for consideration of the laches point. Said the court:

> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair." (327 U. S. at 396, 66 Sup. Ct. at 584.)
>
> "Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that

'laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, — an inequity founded upon some change in the condition or relations of the property or the parties.' [citations omitted] And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.

"Equity will not lend itself to such fraud and historically has relieved from it." (*Ibid.*, 66 Sup. Ct. at 584-585.)

Obviously, the Supreme Court was not discussing the "fraudulent concealment doctrine" or statutes of limitation. It was discussing the considerations applicable to determining whether *laches* barred an action *in equity* and the role of "fraudulent conduct on the part of the defendant" in that connection. The court did not specifically define "fraudulent conduct", but the only conduct then before the court was a fraudulent conveyance—not affirmative concealment of facts under circumstances where a duty to disclose existed. That portion of the opinion is wholly inapplicable to "fraudulent concealment" and a statute of limitations in an action at law.

Continuing with its discussion, the court in *Holmberg* said:

"[T]his Court long ago adopted as its own the old chancery rule that where a plaintiff has been

injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' Bailey v. Glover, [citation omitted]; and see Exploration Co. v. United States, [citation omitted]; Sherwood v. Sutton, [citation omitted].

"This equitable doctrine is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under §16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit. Bailey v. Glover, supra; Exploration Co. v. United States, supra; United States v. Diamond Coal Co. [citation omitted]. It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to *fraud,* when even a federal statute in the same terms would be given the mitigating construction required by that doctrine." (*Id.* at 397, 66 Sup. Ct. at 585). (Italics added.)

Obviously the sentence, "This equitable doctrine is read into every federal statute of limitation", has no application whatsoever to "fraudulent concealment"—it refers only to the *Bailey* doctrine as to undiscovered *fraud,* quoted *verbatim* from *Bailey.* That "This equitable doctrine" was the *Bailey* rule and no more, is not merely

apparent from the context and its immediate antecedent, but is confirmed by the immediately following references to "the alleged deception by Bache which is the basis of this suit" and to "the settled federal equitable doctrine as to fraud". By no stretch of the imagination can this be tortured into even an approval of the "fraudulent concealment doctrine", much less a mandate that a fraudulent concealment rule be applied to every federal statute of limitations.

3. The Other Cases in Federal Courts Do Not Establish a Federal Doctrine of Fraudulent Concealment.

The cases in District Courts and Courts of Appeal which were cited by plaintiffs below[a] do not suffice to establish the existence of a federal doctrine of fraudulent concealment, at least as of 1955 when the statute now before this Court was enacted. Even the District Court here recognized that "most courts probably felt that the doctrine of fraudulent concealment was so interrelated with the statute of limitations that state law should govern" [R. 78]. In fact, analysis will show that all federal cases prior to 1955 (which we have

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[a] *Moviecolor, Limited v. Eastman Kodak Company,* 288 F. 2d 80 (2d Cir.), *cert. denied* 368 U. S. 821, 82 Sup. Ct. 39 (1961); *Suckow Borax Mines Consol. v. Borax Consolidated,* 185 F. 2d 196 (9th Cir.), *cert. denied* 340 U. S. 943, 71 Sup. Ct. 506, *rehear. denied* 341 U. S. 912, 70 Sup. Ct. 620 (1950); *American Tobacco Co. v. Peoples Tobacco Co.,* 204 Fed. 58 (5th Cir.) (1913); *Gaetzi v. Carling Brewing Co.,* 205 F. Supp. 615 (E. D. Mich. 1962); *Dovberg v. Dow Chemical Co.,* 195 F. Supp. 337 (E. D. Pa. 1961); *Philco Corp. v. R.C.A.,* 186 F. Supp. 155 (E. D. Pa. 1960); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.,* 197 F. Supp. 333 (N. D. Ala. 1960); *Klein v. Lionel Corp.,* 130 F. Supp. 725 (D. Del. 1955); *Crummer Co. v. Du Pont,* 117 F. Supp. 870 (N. D. Fla. 1954); *Winkler-Koch Engineering Co. v. Universal Oil Products Co.,* 100 F. Supp. 15 (S. D. N. Y. 1951); *Foster & Kleiser v. Special Site Sign Co., supra,* and *Burnham Chemical Co. v. Borax Consolidated, Ltd., supra.*

found upon diligent search or which have been brought to our attention) which purported to deal with a "fraudulent concealment doctrine" were dealing with *state* law and did not purport to have anything whatsoever to do with *federal* principles. Thus, it is apparent that at the time of the enactment of section 4B there was a well-established federal rule of tolling for undiscovered fraud—applicable *only* to cases based on fraud; and some, but not all, *states* had rules of "fraudulent concealment" which *might* have been applicable, in proper circumstances, to private treble damage actions under the federal antitrust laws.

Compare:

Foster & Kleiser Co. v. Special Site Sign Co., 85 F. 2d 742 (9th Cir. 1936), *cert. denied,* 299 U. S. 613, 57 Sup. Ct. 315 (1937), *and Burnham Chemical Co. v. Borax Consolidated Ltd.,* 170 F. 2d 569 (9th Cir. 1948), *cert. denied,* 336 U. S. 924, 69 Sup. Ct. 655 (1949), *with State of Oklahoma ex rel. Phillips v. American Book Co.,* 144 F. 2d 585 (10th Cir. 1944).

4. Congress Specifically Rejected Proposals to Apply the Equivalent of the Undiscovered Fraud Rule to Section 4B.

The 1955 Amendments to the Clayton Act, including section 4B, were the culmination of extensive and continued consideration by Congress of problems in antitrust law enforcement (including limitations of actions applicable to claims under section 4) which had commenced in 1949 with the introduction by Senator Holland of S. 1910, 81st Congress, 1st Session. That Bill

proposed an amendment to Section 4 of the Clayton Act to add the following:

> "Any action pursuant to this section may be instituted within six years after the accrual of the cause of action hereunder; or, in the case of any such cause of action based upon an alleged conspiracy in violation of the antitrust laws, within six years after the discovery by the plaintiff of the facts upon which he relies for proof of the existence of such conspiracy, if the plaintiff has exercised due diligence in seeking to discover such facts."

Hearings on the bill were held in June and August, 1949 (*Hearings on S. 1910 Before a Subcommittee of the Senate Committee on the Judiciary,* 81st Cong., 1st Sess., pt. 1 [1949]). It was clear from the testimony of proponents of the bill, one of whom was Thurman Arnold (*Id.* at 2-10), former Assistant Attorney General in charge of the Antitrust Division, that the purpose of the "discovery with due diligence" provision was to apply to conspiracy cases "the ordinary rule of equity that the Statute should not run on fraud until the discovery" (*Id.* at 7).

Opponents of S. 1910, complaining that the discovery provision would effectively eliminate the statute of limitations in conspiracy cases and that the retroactive effect of the bill would revive causes of action already barred (*Id.* at 42), also recognized that the intent of the discovery provision was to adopt for antitrust conspiracy cases the usual rule applicable to fraud. Joseph W. Burns, attorney for the American Potash & Chemical Corporation testified, for example:

> "What Mr. Arnold is trying to do is to have this type of action called a fraud action so that

> all the rules with respect to fraud actions which have been built up over hundreds of years to meet a particular situation would be applied to this type of action for which they were never intended." (*Id.*, pt. 2 at 56).

No action was taken on the bill by the Senate Committee. A companion bill, H. R. 4985, had been introduced in the House, but no hearings were held on it, and no action was taken.

In 1950, Representative Denton introduced a similar bill in the House, H. R. 7905, 81st Cong., 2d Session. This bill (which also included a new provision to authorize the United States to bring suit for single damages under the antitrust laws) continued the attempt to make an equivalent of the "undiscovered fraud" rule applicable to antitrust conspiracy cases. Section 4(c) of the bill provided:

> "(c) Any action (including an action brought by or on behalf of the United States) to enforce any cause of action under this section may be commenced within six years after the cause of action accrued or, *if the cause of action is based upon a conspiracy in violation of the antitrust laws, after the plaintiff discovered (or, by the exercise of reasonable diligence, should have discovered) the facts relied upon for proof of the conspiracy;* and every such action (including an action brought by or on behalf of the United States) shall be forever barred unless commenced within such six-year period." (italics added).

The "undiscovered fraud" rule applicable to fraud cases as enunciated by the *Bailey* and *Holmberg* cases

was the obvious source of the "discovery with diligence" portion of this bill. A direct comparison of the relevant language of H. R. 7905 with the relevant language of *Holmberg* conclusively demonstrates the source of the former.

> H. R. 7905: "or if the cause of action is based upon a *conspiracy,* . . . after the plaintiff discovered (or, by the exercise of reasonable diligence, should have discovered) the facts relied upon for proof of the *conspiracy* . . ." (italics added). *Holmberg*: "where a plaintiff has been injured by *fraud* and 'remains in ignorance of it without any fault or want of due diligence or care on his part, the bar of the statute does not begin to run until the *fraud* is discovered . . .'" (italics added).

It will be observed that substituting "fraud" for "conspiracy" in the quoted portion of H. R. 7905, or substituting "conspiracy" for "fraud" in the quotation from *Holmberg* makes the substance of the provisions identical. Furthermore, the test for application of both provisions is the same, *i.e.,* injury by the proscribed conduct (fraud or conspiracy, as the case may be) and lack of knowledge despite due diligence. Neither of those provisions requires any acts of concealment or any duty to disclose, both of which are declared by *Kimball* to be essentials of the "fraudulent concealment" rule.

Major opposition to the conspiracy-discovery provisos in these earlier bills developed at both Senate and House Committee hearings and was quite vehement. In the face of this opposition, Representative Denton, who had introduced H. R. 7905, introduced a substitute bill,

H. R. 8763, which omitted the proviso for tolling in conspiracy cases and provided that any action not brought within six years would be "forever barred." Significantly, this was the first bill to be favorably reported by the House Judiciary Committee and passed by the House. The committee emphasized that the bill rejected the philosophy of S. 1910 with respect to tolling: it referred to S. 1910 as "a bill similar in some respects to the limitations portion of the present bill, except that it contained an added provision for retroactivity and had a special application to suits based upon conspiracy violations." (H. R. Rep. No. 2467, 81st Cong. 2d Sess. 4 [1950].) The Senate did not act upon H. R. 8763 at this session.

The following year, H. R. 1986, 82d Cong., 1st Sess. (1951) was introduced and included conspiracy-discovery provisions similar to the earlier bills. It was not acted upon by the Judiciary Committee. Instead, the Committee held hearings on a second bill, H. R. 3408, 82d Cong., 1st Sess. (1951), introduced by Representative Keating who had participated in hearings on prior bills. This bill contained no conspiracy-discovery provision and included the mandatory language that all causes of action "shall be forever barred" unless commenced within the specified time.

Thus, in every instance when a bill was introduced containing a tolling provision in conspiracy cases equivalent to the undiscovered fraud rule in fraud cases, it was rejected or the provision was deleted. By 1951, when Representative Keating introduced H. R. 3408, containing no such provision, Congress had clearly evidenced its intention that the statute of limitations

should not be subject to tolling until discovery in conspiracy cases.

Any doubt that the discovery provision had been deliberately deleted was dispelled at the 1951 hearings by the testimony of Representative Patman, an ardent and persistent advocate of the discovery provisions: "[A]lthough we favor the running of the statute from the time of discovery, we support the bill even with the 6 years. . . . I think this is a good step in the right direction, but we would like to see it from the time of discovery." (*Hearings on H. R. 3408 Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary,* 82nd Cong., 1st Sess. Ser. 1, pt. 3, at 100 [1951].) Congressman Wilson volunteered at this point: "Of course, if we had an act which did not begin to run until discovery, we would have practically no statute of limitations at all. It would be just unlimited." (*Ibid.*) Mr. Patman conceded: "That's right. . . . I know you gentlemen have a difficult job, and I am for the bill. If you have got to have six years, I am for it. I would rather have the discovery provision; but, if we can't have it, then I am still for the bill." (*Id.* at 100-101.)

A more express rejection by Congress of the application of the undiscovered fraud rule to antitrust conspiracy cases can hardly be imagined. Proposals to incorporate the equivalent of that rule into the new statute of limitations were made by several bills, were both vigorously supported and emphatically condemned by various witnesses, were fully considered by the committees, and were rejected in favor of an absolute, mathematically determinable period.

5. The Reasoning of the District Court Does Not Sustain Its Conclusion.

We have demonstrated that there is and was a well-established federal doctrine of tolling in fraud cases until plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the fraud. That was the doctrine enunciated in the *Bailey* case, followed in the *Rosenthal, Traer, Exploration* and *Diamond Coal* cases, and reaffirmed in *Holmberg*. It is the only *federal* doctrine of tolling until discovery applicable to *federal* causes of action which can be found in any of the Supreme Court cases, or for that matter in any of the cases in the lower federal courts up to 1960. Congress specifically rejected the extension of that doctrine or its application to the new federal statute of limitations applicable to antitrust conspiracy cases. Thus, the basic premises from which the court below reasoned, and upon which it predicated its conclusion, are faulty, and the conclusion must fall with the premises.

We turn now to an analysis of section 4B of the Clayton Act in light of well-established principles for the construction and application of statutes in order to demonstrate that it must be enforced in accordance with its terms and may not be tolled for "fraudulent concealment" or upon any other ground not expressed in the Act.

B. Recognized Principles of Statutory Construction Preclude the Application of a Fraudulent Concealment Doctrine to Sections 4B and 5(b).

Of course, the problem here presented is the determination of the effect which Congress intended sec-

tions 4B and 5(b) of the Clayton Act to have in situations of this kind.

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." (*Holmberg v. Armbrecht,* 327 U. S. 392, 395, 66 Sup. Ct. 582, 584 [1946].)

Here Congress has provided a statute which explicitly limits the right which it created to sue for damages under the antitrust laws, and the issue is whether that statute can be construed to permit the engrafting of a tolling exception which was not expressed by Congress.

The proper approach to statutory construction was rather fully expounded by the Supreme Court in

> *United States v. American Trucking Ass'ns,* 310 U. S. 534, 542-544, 60 Sup. Ct. 1059, 1063-1064 (1940),

as follows:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the court's conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion." (Italics added.)

We shall attempt to follow that suggested analytical method in this portion of our brief, beginning with an analysis of the language of the statute, and proceeding through various principles which may be regarded as aids to construction and the legislative history.

Of course, as the Supreme Court observed in

Pillow v. Roberts, 54 U. S. (13 How.) 472, 476, 14 L. Ed. 228, 230 (1851):

> "It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where the court is so disposed."

And so we shall include some arguments addressed to policy and practicality as well, in order to demonstrate that the intention of Congress as shown by what it did was sound and should be furthered by excluding any implied exception to toll the statute by reason of concealment, and that this statute comes well within the principle that

> "Statutes of limitation are founded on sound policy. They are statutes of repose and should not be evaded by a forced construction." (*Id.* at 477, 14 L. Ed. at 231.)

1. The Language of the Statute Is the Best Guide to Congressional Intent—The Plain Meaning of This Statute Precludes a Concealment Exception.

The principle that statutes should be construed according to the plain meaning of the words used has been phrased in a variety of ways, but although the principle is not entirely inflexible, it is clearly established that the language used provides the best guide

to what was meant and is presumptively controlling. For example:

> "It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. . . . Construction may not be substituted for legislation. [Citing cases.]
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> ". . . [W]here the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." (*United States v. Missouri Pac. R. Co.*, 278 U. S. 269, 277-278, 49 Sup. Ct. 133, 136 [1928].)
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> "[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. . . . [W]e are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction." (*Richards v. United States*, 369 U. S. 1, 9-10, 82 Sup. Ct. 585, 591 [1962].)

The language used by Congress in sections 4B and 5(b) of the Clayton Act is clear, unequivocal and unambiguous:

> Sec. 4B. "Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. . . ."
>
> Sec. 5(b). "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the

> antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

The choice of language can scarcely be said to be haphazard or ill considered. The differences and distinctions in the language used indicate it was carefully chosen to accomplish specific Congressional purposes. It will be observed that the application of section 4B is limited to causes of action under sections 4 and 4A. The suspension of limitations provision of section 5(b) applies not to the identical actions mentioned in section 4B, but to "every private right of action arising under said laws", thus excluding section 4A actions by the United States, but including more than just treble damage actions under section 4, *e.g.*, an action for injunctive relief under section 16 of the Clayton Act (15 U. S. C. §26). The proviso to the suspension provision, that in the event of suspension the "cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued," is equally carefully limited to apply to section 4 actions only, not 4A actions and not every private right of

action. Similarly, actions by the United States under section 4A are specifically excluded from "any civil or criminal proceeding" as events causing suspension of the statute. The Court should not ignore the differences and distinctions in the language used and hold that it means something other than what it says.

The proviso to section 5(b) that an action pursuant to section 4 "shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued" emphasizes both the care with which the sections were drafted and the Congressional intent that such actions be promptly and conclusively barred. The purpose and effect of the proviso is to preclude any construction permitting a plaintiff to add so much of his limitations period as may have remained at the commencement of the suspension period to the end of the suspension period. The draftsmen specifically included the proviso to indicate that they did not intend the section to operate in accordance with the ordinary meaning of "suspended." The obvious inference is that the rest of the words mean what they say.

The inclusion of a specific provision suspending or tolling the limitation period provided in section 4B indicates an intent that the express exception shall be the only one. This is especially true here where the events giving rise to the suspension are clearly and narrowly defined, the suspension is only applicable to part of the cases to which the limitation applies (*i.e.*, section 4 cases but not section 4A cases) and its application is further restricted to cases factually closely related to the events giving rise to the suspension. The entire scheme demonstrates a clear intention to adopt a strict four-year period of limitations running

from the accrual of the cause of action, with only one strictly limited and clearly defined narrow exception.

> "Exemptions made in such detail preclude their enlargement by implication." (*Addison v. Holly Hill Fruit Products,* 322 U. S. 607, 617, 64 Sup. Ct. 1215, 1221 [1944].)

In its opinion holding that "fraudulent concealment" would toll the limitation period of section 4B, the Court of Appeals for the Second Circuit said: "As we read the Supreme Court's opinion in *Holmberg v. Armbrecht, supra,* that policy [of tolling in cases of fraudulent concealment] is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language." *Atlantic City Electric Co. v. General Electric Co.,* 1963 CCH Trade Reg. Rep. ¶70,604, pp. 77480-81 (2d Cir. 1963). It is not reasonable, logical, or sustainable on principle or authority that when Congress has clearly expressed what it does intend, it must specifically list and describe what it does not intend in order to avoid having such matters foisted upon it by the courts.

> *Soriano v. United States,* 352 U. S. 270, 77 Sup. Ct. 269 (1957),

although involving a limitation upon actions against the United States rather than upon actions between private persons, is directly in point on the matter of ascertainment of Congressional intent in situations of this kind. The limitation in question contained a specific provision for tolling in respect of persons under legal disability or beyond the seas at the time the claim accrues. The petitioner sought a further tolling exception based on war. The Supreme Court held that no such exemption could be implied, saying:

> "To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. For example, statutes permitting suits for tax refunds, tort actions, alien property litigation, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war." (*Id.* at 275-76, 77 Sup. Ct. at 273.)

Besides demonstrating the fallacy in and being wholly at variance with the reasoning of the Court of Appeals for the Second Circuit, the *Soriano* reasoning indicates that Congress intended that section 4B *not* be tolled by reason of concealment. In the *Soriano* case, the Supreme Court found it significant that Congress had specifically provided for tolling because of war when that was its intent. Congress has also provided for tolling where defendant's conduct was concealed, when that was its intent.[b] By a parity of

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[b]See, *e.g.*, 50 U.S.C.A. App. §1215(c). "In the absence of fraud or malfeasance or willful misrepresentation of a material fact, no proceeding to determine the amount of excessive profits for any fiscal year shall be commenced more than one year after a financial statement . . . is filed . . . with respect to such year, . . ."

31 U.S.C.A. §131. "If any endorser [etc.] . . . shall fraudulently conceal the cause of such action from the knowledge of the United States . . . the action may be commenced at any time

reasoning, its failure to mention fraudulent concealment in section 4B or section 5(b) indicates an intention that the statute *not* be so tolled.

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within two years after the United States . . . shall discover that the United States . . . had such action, although such action would be otherwise barred by the provisions of sections 129-131 of this title."

12 U.S.C.A. §1817(g). ". . . No action or proceeding shall be brought for the recovery of any assessment due to the Corporation, or for the recovery of any amount paid to the Corporation in excess of the amount due to it, unless such action or proceeding shall have been brought within five years after the right accrued . . . except where the insured bank has made or filed with the Corporation a false or fraudulent certified statement with the intent to evade, . . . the payment of assessment, in which case the claim shall not be deemed to have accrued until the discovery by the Corporation that the certified statement is false or fraudulent: . . ."

15 U.S.C.A. §78r(c) "No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued."

15 U.S.C.A. §77m. "No action shall be maintained . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, . . ."

15 U.S.C.A. §78i(e). ". . . No action shall be maintained . . . unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation."

15 U.S.C.A. §77www. ". . . No action shall be maintained . . . unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued."

19 U.S.C.A. §1621. "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided*, That the time of . . . any concealment . . . of the property, shall not be reckoned within this period of limitation."

26 U.S.C.A. §6501(c) excepts from the limitations on assessment and suits for collection without assessment of tax (1) taxes in respect of which there was "a false or fraudulent return with the intent to evade tax," (2) taxes in respect of which there was "a willful attempt in any manner to defeat or evade tax," and (3) taxes in respect of which there was "failure to file a return."

2. The Limitations of Sections 4B and 5(b) Are Limitations on the Right Itself and Are Not Subject to Judicially Imposed Tolling.

The Supreme Court has on a number of occasions differentiated between limitations which extinguish the right itself and those which merely bar the remedy.

> "[O]rdinary limitations of actions are treated as laws of procedure, and as belonging to the *lex fori,* as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not." (*Davis v. Mills,* 194 U. S. 451, 454, 24 Sup. Ct. 692, 693-694 [1904].)
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> "[T]he two-year provision of the [Interstate Commerce] act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion." (*United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission,* 246 U. S. 638, 38 Sup. Ct. 408, 409 [1918].)
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> "Plaintiff's cause of action was created and limited by the Interstate Commerce Act. . . .
>
> "Plaintiff's right to file his claim with the Commission had expired several months before the passage of the Transportation Act. But, if the

period of federal control is to be excluded [as provided in the Transportation Act], the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the Commission and had no cause of action. It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff. [Citations omitted.] On the expiration of the two-year period, it was as if liability had never existed." (*William Danzer & Co. v. Gulf & S.I.R. Co.,* 268 U. S. 633, 635-636, 45 Sup. Ct. 612, 613 [1924].)

"The statute [Materialmen's Act] thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself. [Citing cases.]" (*United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U. S. 157, 34 Sup. Ct. 550, 552 [1914].)

Other occasions where the Supreme Court made such differentiation include:

A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 35 Sup. Ct. 444, 446 (1915);

Atlantic C. L. R. Co. v. Burnette, 239 U. S. 199, 36 Sup. Ct. 75, 76 (1915);

Cf., Globe Newspaper Co. v. Walker, 210 U. S. 356, 28 Sup. Ct. 726 (1908); and

Pollard v. Bailey, 87 U. S. (20 Wall.) 520, 22 L. Ed. 376 (1874).

Other federal courts have consistently concluded that where the limitation is provided by the same statute which creates the right, the limitation is jurisdictional.

Matheny v. Porter, 158 F. 2d 478, 479 (10th Cir. 1946);

Scott v. Railroad Retirement Board, 227 F. 2d 684 (7th Cir. 1955);

Leimer v. Woods, 196 F. 2d 828 (8th Cir. 1952);

Ewing v. Risher, 176 F. 2d 641 (10th Cir. 1949); and

United States ex rel. Gibson Lumber Co. v. Boomer, 183 Fed. 726 (8th Cir. 1910).

And the conclusion that the limitation is jurisdictional has been specifically applied to prevent tolling by reason of fraudulent concealment.

> "In case of ordinary limitations, a person may, by his voluntary act, waive their benefit. Or the law will deny the privilege of urging them to one who, by his fraudulent acts, has prevented another from asserting his right.
>
> "But the same considerations do not obtain when we are dealing with a statute [Veteran's Emergency Housing Act of 1960] which calls into being the obligation from which the action stems and which decrees that it shall be instituted within a limited period only.
>
> "Here the passage of time destroys the very right which is the basis of the action. And neither agreement, waiver, nor fraud can serve to keep alive the expiring right or to recapture it after it has become extinct." (*Adams v. Albany,* 80 F. Supp. 876, 881 [S. D. Cal. 1948].)

"We are dealing with a special statute relative only to qui tam actions, and it carries its own jurisdictional requirement that action be brought within six years. The language is plain and unambiguous and we think it should be strictly construed. It is not to be tolled or extended on account of fraud . . . for it involves jurisdiction of the subject matter, and that cannot be acquired even by consent, in opposition to the statute." (*United States ex rel. Nitkey v. Dawes,* 151 F. 2d 639, 644 [7th Cir. 1945] *cert. denied,* 327 U. S. 788, 66 Sup. Ct. 808 [1946].)

"Where the time for commencing action is prescribed in the statute which creates the liability and gives the right of action, the time is not extended by reason of fraud or concealment which might work an extension of ordinary statutes of limitation." (*Pollen v. Ford Instrument Co.,* 108 F. 2d 762, 763 [2d Cir. 1940].)

Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U. S. 356, 64 Sup. Ct. 128 (1943), demonstrates vividly the nature of such limitations upon the right. That was an action by a rail carrier to recover freight charges from a shipper. Three days before the statute of limitations applicable to such suits ran, the parties, at the request of the shipper, entered into a written agreement whereby in consideration of the carrier's forbearance to sue, the shipper agreed not to plead the statute of limitations. The action was brought after the statute had run but within the time fixed in the agreement. Despite its agreement, the shipper pleaded the statute of limitations. The Supreme Court, after analyzing the legislative policy to be advanced by the

limitation, concluded that the limitation was intended to be a limitation upon the right itself, that the passage of time extinguished the right, and that not even an express contract could vary that result.

Perhaps whether a limitations provision extinguishes the right and is not subject to tolling on equitable grounds is a matter of legislative intent, and applying a rule of construction, such as whether the right and the limitation are created by the same statute, may disclose that intent. (*See, e.g. Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U. S. 356, 360, 64 Sup. Ct. 128, 130 [1943]; and *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231, 79 Sup. Ct. 760 [1959].) But be that as it may, the authorities cited and quoted in this section establish at the minimum that (1) where the limitation is on the right itself, the period may not be extended for any reason not expressed in the limitation, and (2) when the limitation is imposed by the statute creating the right and refers expressly to the right, that is at least highly persuasive that the limitation limits the right.

In this case, sections 4B and 5(b) both refer specifically to actions to enforce causes of action under section 4, which created the right which plaintiffs assert here.

> "[W]hatever plaintiff's rights may be, they exist solely by virtue of the statute, as no right to recover treble damages was known to the common law." (*Sun Theatre Corp. v. R.K.O. Radio Pictures, Inc.*, 213 F. 2d 284, 286 [7th Cir. 1954].)

The limitation is of narrow and specific application; it limits rights under sections 4 and 4A only; it does not apply generally to civil actions to enforce the anti-

trust laws or even to every such private right of action. Both the rights and the limitation were created by and form a part of the same act. The limitation could not be more expressly imposed upon a specific right. This presents a clear cut and classical case of the imposition by Congress of a limitation upon the right itself, with the necessary consequence that the period cannot be tolled or extended by reason of matters not mentioned in the statute.

The Court of Appeals for the Eighth Circuit disposed of this argument in part upon the ground that "The very fact that the limitation period was added forty-one years after the enactment of the Clayton Act is indicative that §4B was not part of a legislative scheme creating a right." *Kansas City, Missouri v. Federal Pacific Electric Co.,* 310 F. 2d 271 (8th Cir. 1962). It is true enough that section 4B was added to the Clayton Act by amendment long after the original enactment of section 4, but that fact by no means establishes or even supports an inference that the limitation of section 4B is not upon the right itself. On the contrary, that section 4B provides a limitation on the right created by section 4 is amply demonstrated both (1) by application of the rule of construction that when the limitation is provided by the statute creating the right the limitation is on the right itself, and (2) by a more extended analysis of other indicia of Congress' intent as expressed in its enactment.

The fact that the limitation was added by amendment does not defeat the application of the rule that when the limitation and the right are created by the same statute the limitation is on the right itself, for amended statutes should be construed as if the amend-

ment had been present in the original enactment. The Supreme Court has stated the rule (quoting from *Farrell v. State,* 54 N. J. L. 421, 24 Atl. 725 [1892]):

> "'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended.'" (*Blair v. Chicago,* 201 U. S. 400, 26 Sup. Ct. 427, 446 [1906].)

And that is clearly the rule in the Ninth Circuit.

McClure v. United States, 95 F. 2d 744, 750 (9th Cir. 1938); *aff'd,* 305 U. S. 372, 59 Sup. Ct. 335 (1939); and

Steffler v. Johnston, 121 F. 2d 447 (9th Cir.), *cert. denied,* 314 U. S. 676, 62 Sup. Ct. 187 (1941).

The right of the government to sue for damages under section 4A was clearly created at the same time as and by the same act as the limitation of section 4B, which applies by its terms to both section 4 and section 4A. On the face of things, the limitation should thus be directly upon the right created by section 4A. It would be incongruous to construe section 4B as creating a limitation on the right created by section 4A but not upon that created by section 4 when by its terms the limitation applies equally to both. (*See Midstate Horticultural Co. v. Pennsylvania R. Co.,* 320 U. S. 356, 64 Sup. Ct. 128 [1943].)

Since the limitation of section 4B was specifically directed to the right created by section 4, it should be construed as a limitation upon that right without regard to its statutory source or time of enactment.

> "But the fact that the limitation is contained in the same section or the same statute is ma-

> terial only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created. . . . The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." (*Davis v. Mills,* 194 U. S. 451, 454, 24 Sup. Ct. 692, 694 [1904].)

And all of the Supreme Court cases holding that the limitations provisions of the Interstate Commerce Act are limitations upon the rights therein created confirm this point, for there were no limitations provisions at all in that act as originally enacted. Among such cases are

Midstate Horticultural Co. v. Pennsylvania R. Co., supra;

A. J. Phillips Co. v. Grand Trunk W. R. Co., supra; and

United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, supra.

All of the foregoing clearly evidences the intention of Congress that the limitation of section 4B be upon the right created by section 4, and that the limitation not be subject to extension or tolling by concealment.

3. The Legislative History Demonstrates That Congress Intended that Concealment Not Toll the Statute of Limitations.

In an earlier section of our brief, we demonstrated that Congress specifically rejected the extension of the "undiscovered fraud" doctrine as enunciated by the *Bailey* and *Holmberg* cases to apply to undiscovered conspiracies violating the antitrust laws. Further anal-

ysis of the legislative history demonstrates that in the course of considering the specific proposals before it, Congress thoroughly reviewed the problem of the plaintiff who was unable, despite due diligence, to discover the conduct which had injured him and, following such review, Congress concluded that an absolute four-year statute of limitations should be prescribed, unrelieved by any tolling provision applicable to concealed conduct.

The proponents of the tolling-until-discovery provisions were emphatic that the evil at which those provisions were directed was the concealed conspiracy and that the purpose of the tolling provisions was to change what they regarded as the existing law that "[a]s long as they keep their conspiracy a secret for [the applicable statutory period], they are immune from treble-damage antitrust suits". (Testimony of Mr. Burnham, *Hearings on H. R. 7905 Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., ser. 14, pt. 5, at 31 [1950].)

In the earliest hearings on S. 1910, Thurmond Arnold in 1949 made it absolutely clear that the purpose of the tolling proviso was to give relief against concealed conspiracies. Senator Donnell inquired as to the reason why the tolling proviso was limited to conspiracy cases.

> "Mr. Arnold . . . I suppose that if it is an action against you for some restraint of trade, then you have the protection of the statute regardless of the discovery of the evidence, that is, an individual. *But if a combination of people who are ostensibly competing and actively concealing the fact that they are not competing, then that is a sufficiently*

fraudulent concealment so that the ordinary rule of equity that the statute should not run on fraud until the discovery is applied.

". . . The language limits the provisions to cases of conspiracy, probably on the theory that conspiracy is an active concealment of the fraud. . . .

"Senator Donnell. That is the point that was in my mind. It is a question of why the first part of the section was so-all-inclusive, relative to 'any action pursuant to this section' whereas the concluding portion, which refers to the right to institute within 6 years after the discovery of the facts, that is limited to the date of the conspiracy?

"Mr. Arnold. I will give you the argument for it. If we said 'The accrual of any cause of action is at the time of discovery of the evidence' it might be a pretty harsh rule. And the real, equitable case for allowing the statute to be tolled by failure to get evidence is the case when one of these Nation-wide conspiracies, *with their power to put a competitive smoke screen over their activities." (Hearings on S. 1910 Before a Subcommittee of the Senate Committee on the Judiciary,* 81st Cong., 1st Sess., pt. 1, at 6-7 [1949].) (Italics added.)

Mr. Burnham gave as a compelling reason for the adoption of the tolling provision, the following:

"A conspiracy is a secret act. It is difficult to discover. Those who conspire to monopolize or restrain trade, kept their conspiracy guarded. They know if they can keep it concealed long enough,

they can get away with their wrongdoing. They can drive out competition and milk the public as long as they keep it secret. There is nothing to stop them." (*Id.* at 19.)

Mr. Burnham also made a similar statement before the Subcommittee on the Study of Monopoly Power of the House Judiciary Committee:

"The word 'conspiracy' is not mentioned in the California statute of limitations. The period of limitations can be tolled if there has been a fraud, or mistake, but not if there has been a conspiracy to monopolize, or to restrain trade. In the case of fraud or mistake, the period of limitation begins to run upon discovery of the facts constituting the fraud or mistake but if there has been a conspiracy to injure another, the statute of limitation begins to run from the time of damage and not from the time of discovery of the conspiracy.

"Therefore, under California law, a wrongdoer can conspire to monopolize or restrain trade, *and if he keeps his conspiracy secret for 3 years, he is immune from the law.* In California it is easy for monopolies to grow and prosper and concentrate their economic power. As a result there is a major breakdown in the antitrust laws." (*Hearings on H. R. 7905 Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary,* 81st Cong., 2d Sess., ser. 14, pt. 5, at 25 [1950].) (Italics added.)

Professor Walton Hamilton, former Special Assistant to the Attorney General on Antitrust Matters and another proponent of the tolling provision, clearly in-

dicated that he felt the tolling provision was necessary to catch the defendant who concealed his conspiracies:

> "There is a difference, it seems to me, between classes of cases. For instance, in violation of the Robinson-Patman Act, some supplier is giving goods to one customer cheaper than he is giving it to another. Rumors of that can usually be picked up in the trade. The fact can be then alleged on information and belief and you can resort to discovery, but as Mr. Justice Miller, one of the great common-law jurists, put it some time ago, in connection with conspiracy the very matter is of such a character that it is the interest of the conspirators to conceal the conspiracy, *and if* they conceal it to such an extent that one cannot draw a complaint that will stick in court, then the man who has a grievance is denied his day in court, and that happens in those cases. So it is in connection with the inability to make the discovery that is essential to the cause of the action that that would be brought into play; I don't think otherwise it would be brought into play. It meets the rare case but it is quite necessary to meet the rate case.
>
> ". . . So in this case I don't fear any plagiary. I think it only rarely you will find that old affairs are dug up and it seems to me that *the law ought not to be written in such a way as virtually to say to the defendants, 'If you can successfully, for the period during which the statute of limitations runs, conceal your crime then you win immunity thereby.'*" (*Id.* at 59-60.) (Italics added.)

Representative Patman stated to the Subcommittee on Study of Monopoly Power that:

> ". . . [Y]ou know you have cases or practices where concerns were able to make these agreements, squeeze out people, completely destroy their businesses and it would be even a 4-year period or a 6-year period before it is discovered. And by reason of that *concealment and conspiracy* these people have been destroyed, and yet they have no cause of action." (*Hearings on H. R. 3408 Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82nd Cong., 1st Sess., ser. 1, pt. 3, at 100 [1951].)

The urgency with which these proponents argued their case before the Senate and House Judiciary Committees makes it clear that they considered it absolutely essential to incorporate a specific tolling provision to prevent victims of concealed conspiracies from losing their cause of action. As Representative Patman repeatedly emphasized, "And by reason of that concealment and conspiracy these people have been destroyed, and yet they have no cause of action." (*Ibid.*) He further added:

> "It just occurs to me that there should be some way in a case like that that the parties who have been so unmercifully treated should have some kind of cause of action against those who conspired against them." (*Ibid.*)

Mr. John C. Stedman of the Department of Justice Antitrust Division stated:

> ". . . Conspiracies are notoriously hard to detect and harder to prove. Without such a [tolling] pro-

vision the right to sue for damages would be illusory in many cases, for the plaintiff would often be unable to discover the facts needed to support his charge of conspiracy until more than 6 years after its formation." (*Hearings on H. R. 7905 Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary,* 81st Cong., 2d Sess., ser. 14, pt. 5, at 65 [1950].)

The foregoing makes it apparent that the proponents of this legislation were not merely supporting the particular proposal but were presenting to Congress the entire problem of the concealed conspiracy in the hope that *some* solution satisfactory to them would result.

In the same vein, the opponents of the particular discovery proposals were not merely opposed to the particular proposals, but they opposed *any* tolling of the statute until "discovery with diligence" and advocated the adoption of an absolute limitation subject to ready mathematical computation.

Professor Milton Handler repeatedly asserted that any tolling provision, however worded, was objectionable and should be rejected:

> "I say that the discovery provision, conditioning the operation of a statute upon discovery of the violation by the aggrieved party, introduces an uncertainty which is repugnant to the very idea of a statute of repose.
>
> * * *
>
> "I am first talking about discovery in general; then I am talking about the particular kind of discovery provided for in this bill. I am objecting to both in general and in particular.

". . . The main office of a statute of limitations is the creation of a definite bar after the passage of a specified number of years. Whether an action is barred should depend upon the objective facts and be capable of simple mathematical calculation. To import a mental element in a statute of repose is administratively undesirable.

* * *

"Most antitrust suits are based upon a charge of conspiracy. Conspiracies are proved by circumstantial evidence. They are inferred from a course of action. It is unnecessary to prove the existence of an actual agreement among the alleged conspirators.

* * *

"I strongly urge the elimination of the discovery features of the bill. The 6-year limitation should apply to conspiracies as well as other violations, the statute to be operative from the time the cause of action accrues. . . ." (*Id.* at 21-22.)

Jerrold G. Van Cise, on behalf of the New York State Bar Association, stated that a tolling provision would encourage stale litigation and invoke suits for many years of accumulated damages in astronomical amounts which would ruin otherwise solvent companies:

"These new and drastic extensions of the statutory period would open the doors to serious abuses. As our courts continue to give new content to our antitrust laws, past conduct taken in good faith becomes retroactively unlawful. The past transactions, in turn, under the Denton bill would provide inviting bases to litigious plaintiffs

to sue for many years of accumulated treble damages. As a result, companies otherwise solvent might suddenly be confronted with treble-damage claims of astronomical size. Stale litigation of the most vicious nature—most difficult to defend by reason of the passage of time and death of witnesses—would be affirmative encouraged.

* * *

"The discovery provision in fact runs counter to the fundamental reason underlying statutory limitation periods, namely, to outlaw stale claims which may surprise parties when all proper evidence is lost, or the facts have become obscured from the lapse of time or from defective memory or from death or removal of witnesses. The defense of the statute of limitations is sometimes viewed unfavorable (*sic*) as unjust or technical; but over a hundred years ago, in Bell v. Morrison (1 Pet. 351, 360), the Supreme Court of the United States thrust aside this criticism, characterized statutory limitation periods as 'wise and beneficial,' and stressed that they afforded security against stale demands after the true facts may have been forgotten. This view was reiterated as recently as 1938, in Guaranty Trust Company v. United States (304 U.S. 126, 136), by Mr. Justice Stone, in characterizing the statute of limitations as designed to make an end to the possibility of litigation after a reasonable time, and approving such statutes as meritorious defenses serving a public interest. Although the application of such statutes may on rare occasions bar the assertion of a just claim, nevertheless such occasional hardship is outweighed by the policy of outlawing stale

claims (Schmidt v. Merchants Dispatch Transportation Co., 270 N.Y. 287, 302 (1936).

"The Denton bill should provide a clear-cut, uniform statutory period of reasonable duration—stated in a fixed term of years—in lieu of its present unrealistic and inequitable provisions." (*Id.* at 50.)

The American Bar Association, pursuant to a resolution adopted by the Association, filed a memorandum in which the tolling provision was criticized and the need for a ceiling on the period of accrual of treble damages was explained:

". . . The vast majority of triple-damage actions are based upon an alleged conspiracy in violation of the antitrust laws. In every case the plaintiff can, under the proposed amendment, allege that he did not discover the facts upon which his complaint is based until some time within the 6-year period, even though the cause of action in fact accrued many years prior to the institution of the suit. Such an allegation is relatively easy for the plaintiff to prove by his own testimony, and most difficult for the defendant to disprove. Thus, in practically every case the plaintiff can carry back his cause of action to some indefinite period in the past and thereby defeat the benefits supposed to result from the limitations provision. Under such a statute a defendant will never really know when the cause of action is barred.

* * *

"Section 4(c), as drawn, is practically worthless as a statute of repose, which is its supposed purpose and justification." (*Id.* at 96-97.)

Mr. Joseph W. Burns, one of the attorneys for the American Potash & Chemical Corporation in the *Burnham* case stressed the illusory nature of the tolling provisions as follows:

> "Any attempt to distinguish the first provision [of H. R. 4985] from the second is illusory. The very essence of the restraint of trade violations referred to in the first provision is an agreement, combination, or conspiracy in restraint of trade. In practical effect there would be no cases to which the first provisions would apply, as a plaintiff could always allege a conspiracy. The real effect of the second provision would be to eliminate any fixed period of limitation from the time the damage occurred, and leave if open indefinitely." (*Id.* at 73-74.)

Obviously, Congress' rejection of the express tolling proposals made to it, and its failure to provide any other tolling relief in respect of concealed causes of action, in light of the testimony and argument which were presented to its committees, can only be taken as a rejection of all tolling concepts with respect to concealed causes of action.

4. Policy Considerations Favor the Construction of Sections 4B and 5(b) According to Their Terms—Without Any Implied Exceptions.

Continuing with Mr. Justice Reed's approach (*United States v. American Trucking Ass'ns, supra*), we now consider whether the literal application of sections 4B and 5(b) would produce "absurd or futile results" or "an unreasonable [result] 'plainly at variance with the policy of the legislation as a whole' ". A literal appli-

cation does not lead either to absurd results or to unreasonable results at variance with the policy of the legislation, but the results of literal application are wholly reasonable. Any other construction would tend to defeat the legislation and its policy.

This inquiry into policies and results to determine the proper construction of the statute is a further way of testing congressional intent. The inquiry is into the policy of the Congress, and whether the Court approves of congressional policies is not a material factor in the inquiry.

> "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." (*United States v. Great Northern Ry. Co.*, 343 U. S. 562, 575, 72 Sup. Ct. 985, 993 [1952].)
>
> "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it." (*Anderson v. Wilson,* 289 U. S. 20, 27, 53 Sup. Ct. 417, 420 [1933].)
>
> "[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made." (*United States v. Cooper Corporation,* 312 U. S. 600, 605, 61 Sup. Ct. 742, 744 [1941].)

And it is clear that statutes of limitation do not constitute a special category of legislation to be enforced or not at the pleasure of the courts. To the contrary, statutes of limitation as a class have been con-

sistently held to embody a sound public policy which should be enforced as expressed.

> "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away.
>
> ". . . The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, ..." (*Clementson v. Williams,* 12 U. S. [8 Cranch] 72, 74, 3 L. Ed. 491, 492 [1814].)
>
> "The statute of limitations is emphatically termed a statute of repose; it is made for the purpose of quieting rights and shutting out stale and fraudulent claims. It has, therefore, always been construed strictly against the plaintiff, and no case has been excepted from its operation, unless within the strict letter or manifest equity of some exception in the act itself." (*Shipp v. Miller's Heirs,* 15 U. S. [2 Wheat.] 316, 324, 4 L. Ed. 248, 251 [1817].)
>
> "Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. Rosenman v. United States, 323 U. S. 658, 661, 65 S. Ct. 536, 538, 89 L. Ed. 535. Remedies for resulting inequities are to be provided by Congress, not the courts." (*Kavanagh v. Noble,* 332 U. S. 535, 539, 68 Sup. Ct. 235, 237 [1948].)

Although some of the policies which Congress was attempting to effectuate when it enacted sections 4B

and 5(b) are apparent from those sections standing alone and the legislative history specifically directed to them, those policies take on flesh and others become apparent when the 1955 amendments to the Clayton Act are considered as a whole. Public Law 137, Chapter 283, 84th Congress, 1st Session (which is reproduced in full text as Appendix A hereto), included the following provisions:

1. Section 4A was added to the Clayton Act to provide a remedy to the United States of single damages whenever it was injured in its business or property by violations of the antitrust laws. This was a new remedy not theretofore available.

2. Section 4B was added to the Clayton Act to provide a uniform statute of limitations of 4 years after the cause of action accrued for private treble damage actions under section 4 and for government actions under section 4A. This was a new limitation statute to replace the prior practice of borrowing the applicable statute of limitations of the state in which the district court sat or in which the cause of action accrued.

3. Subdivision (a) of section 5 of the Clayton Act, having to do with the effect of judgments or decrees obtained in government civil or criminal proceedings in private actions was amended to give the government the benefit of the section in actions for damages under section 4A, and to exclude from the judgments or decrees having *prima facie* effect in other proceedings those obtained by the government in actions for damages pursuant to section 4A.

4. Subdivision (b) of section 5 of the Clayton Act, having to do with suspension of the statute of limita-

tions during government proceedings, was amended: (i) to provide that a government proceeding under section 4A would *not* suspend the statute of limitations; (ii) to change the period of suspension from simply "during the pendency of the government proceeding" to "during the pendency of such proceeding and for one year thereafter"; and (iii) to prohibit tacking of the period of limitation and the period of suspension in actions under section 4, by requiring the action be brought *either* within the period of suspension *or* within 4 years after the cause of action accrued. It will be observed that section 5(b) does not suspend the period within which the government may bring an action for damages under section 4A.

5. Section 7 of the Sherman Act (which provided a private right of action for treble damages for injuries to business or property by reason of conduct violating the Sherman Act) was repealed, because section 4 of the Clayton Act included the remedy of that section and made it obsolete.

6. A further provision established a grace period of six months within which actions not barred under prior law, but which would be barred under the new law, could be brought.

This new general revision of the provisions for enforcement of the antitrust laws by way of actions for damages, was (as we have seen) the culmination of an extended consideration of such problems by the Congress, particularly its Judiciary Committees and subcommittees, over a six-year period, which included at least five sets of public hearings and consideration of the recommendations in the 1955 Report of the Attorney General's National Committee to Study the An-

titrust Laws. The specific limitations provisions now under consideration constitute an integral part of that general revision of the scheme of Congress for the enforcement of the antitrust laws, and they must be construed in that light.

In this situation the Court must use extreme care to be sure that its ruling will effectuate the intent of Congress and further the congressional plan, not alter or frustrate it by substituting the Court's view of what Congress ought to have done for that which it did. The subject matter of this law, the regulation of the economic affairs of the nation, emphasizes the need to be sure that the program of the Congress be effectuated and that the law be enforced precisely as Congress intended. The necessity for hewing closely to the expressed intention of the legislature in construing statutes such as this, which can have such far-reaching consequences to the economic health of the nation, was thoroughly discussed by the Supreme Court (in connection with the Texas antitrust laws) in

Tigner v. State of Texas, 310 U. S. 141, 148-49, 60 Sup. Ct. 879, 882-83 (1940):

"How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by qui tam action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such

judgment as yet is largely a prophecy based on meager and uninterpreted experience. How empiric the process is of adjusting remedy to policy, is shown by the history of anti-trust laws in Texas and elsewhere. The Sherman Law originally employed the injunction at the suit of the government, private action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors. [Footnote omitted.] In the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, 49 U. S. C. A. §1 et seq., Keogh v. Chicago & N. W. R. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183, and in the case of shipping combinations, by the Merchant Marine Act, 46 U. S. C. A. §861 et seq., United States Nav. Co. v. Cunard S.S. Co., 284 U. S. 474, 52 S. Ct. 247, 76 L. Ed. 408. In its own groping efforts to deal with the problem of monopoly, the Texas legislature has in the course of nearly half a century invoked a dozen remedies. [Footnote omitted.] When Iowa superimposed upon its general anti-trust law an additional penalty in the case of fire insurance combinations, this Court sustained the validity of the statute. Carroll v. Greenwich Insurance Co., 199 U. S. 401, 26 S. Ct. 66, 50 L. Ed. 246.

"Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public

> opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence."

In light of the Supreme Court's admonitions to use extreme care to further the legislative policies in such sensitive areas as these, let us consider some policy matters relevant to the proper application of sections 4B and 5(b).

1. Sections 4B and 5(b) were enacted to secure uniformity in the administration of the law respecting limitations on treble damage suits for violations of the antitrust laws. This is amply evidenced by the title to the act: "An Act to amend the Clayton Act by . . . establishing a uniform statute of limitations." (Pub. L. No. 137, c. 283, 84th Cong., 1st Sess. [1955].) Further, it was well known that prior to the enactment of section 4B there was great variation in the statutes of limitations applied to private treble damage actions, and there was general agreement that this situation should be remedied. (See, Report of the Attorney General's National Committee To Study the Antitrust Laws, 380-83 [1955].)

> "It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our federal laws. This will be accomplished by establishing a uniform statute of limitations

> applicable to all private treble damage actions—and Government damage actions as well—of 4 years." (H. R. Rep. No. 422, 84th Cong., 1st Sess., 7 [1955].)

Enforcement of section 4B and 5(b) in accordance with their terms would in fact produce uniformity of treatment to treble damage plaintiffs. The statute of limitations or the period for which recovery was allowed would be the same for each. On the other hand, to import into the limitation a tolling exception based upon "concealment," with concomitant termination of the tolling based upon subjective factors of "discovered" or "should have discovered," is to make the statute unequal in operation by penalizing the suspicious and diligent and rewarding the gullible and lazy, and would completely destroy the uniformity of application which Congress obviously sought.

2. Sections 4B and 5(b) were enacted to bar stale claims, whether well or ill founded. That is the obvious and usual purpose of statutes of limitation. (*Kavanagh v. Noble, supra.*) Enforcement of the sections in accordance with their terms is not only wholly consistent with but furthers that policy. All claims will be barred four years after they accrue, *except* claims as to which the statute is suspended by reason of section 5(b), and as to these, the pendency of the government proceedings causing the suspension should prevent the loss of evidence or the surprise of the defendant.

Congress not merely intended to bar stale claims, but it intended to *shorten* the period within which they might be brought.

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the

statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will tend to shorten the period over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws."

(S. Rep. No. 619, 84th Cong., 1st Sess. 6 [1955].)

The importation of a doctrine of tolling during concealment or until discovery destroys completely the effectiveness of a statute of limitation in disposing of stale claims, and it is wholly inconsistent with any purpose to shorten the period within which suit must be brought. The importation of a tolling-for-concealment exception would be especially destructive of the Congressional purpose to bar stale claims when applied to these sections, for the usual antitrust violation is by its nature concealed or self-concealing. In

Grunewald v. United States, 353 U. S. 391, 77 Sup. Ct. 963 (1957),

(a case apposite here primarily for its discussion of the nature of conspiracies) the Supreme Court recognized the fact that

> ". . . [E]very conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.
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> "We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished." (*Id.* at 402, 77 Sup. Ct. at 974.)

Further, in order to be effective most combinations or conspiracies in restraint of trade must be kept secret from the persons against whom the restraints are directed. These obvious facts must have been apparent to the Congress (unless we are to impute to the Congress a wholly unrealistic naivety when it enacted sections 4B and 5(b), and the testimony of witnesses mentioned above confirms that the committees were fully aware of this situation. The absolute nature of the language used ("any action to enforce any cause of action . . . shall be forever barred") without any

exception for conspiracy cases indicates a congressional policy that concealment of the facts or cause of action shall be immaterial to the operation of the statute in accordance with its terms. Similar reasoning was followed in

> *United States v. Borin,* 209 F. 2d 145 (5th Cir.) *cert. denied* 348 U. S. 821, 75 Sup. Ct. 33 (1954),

when the Supreme Court denied a claim that the statute of limitations in the False Claims Act (31 U. S. C. §235) did not commence to run until discovery of the fraud:

> "The section is explicit in commanding that every suit be commenced within six years from the commission of the act, *and not afterward.* This emphatic language must have been employed with full recognition of the fact that in most cases the falsity of the claim would remain concealed for a long time. The intention seems clear that the time would not be extended on account of any *fraud or concealment.*" (*Id.* at 147-48.) (Italics by the court.)

3. Sections 4B and 5(b) were enacted to protect the courts from the burdens of stale treble damage claims.

> "It further provides that while the period in which to bring a private treble damage action shall in no case be less than 4 years, nevertheless, in instances where a private suit is tolled because of the pendency of a Government proceeding, private treble damage actions must be instituted within 1 year after the termination of the Government's case if, at the end of such period, 4 years or

more shall have elapsed since the cause of action accrued. This requirement is designed to prevent interminable delay and congestion of court calendars, as well as encouraging the prompt adjudication of private treble damage suits."

(*H. R. Rep. No.* 442, *supra,* at 2)

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts, It believes the provisions of this bill will tend to shorten the period over which private triple damage cases will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded." (*Id.* at 8.)

The continuing concern of Congress with the congestion of the federal courts, and its desire to alleviate those burdens, is further illustrated by the recent amendments to the Judicial Code increasing the jurisdictional minimums to $10,000 and imposing other restrictions upon access to the federal courts. (Pub. L. No. 85-554, 72 Stat. 415 [85th Cong. 1958].)

In this connection, it may also be noted that section 4 expands the jurisdiction of the United States District Courts by eliminating the "amount in controversy" qualification. Historically, statutes granting jurisdiction to the District Courts have been construed to restrict that jurisdiction insofar as possible within

the limits of the language used by Congress. (See, *e.g., Flora v. United States,* 362 U. S. 145, 80 Sup. Ct. 630 (1960), which involved the jurisdiction of the District Courts over claims for refund of income taxes.) And the Supreme Court has refused to permit equitable considerations to expand such jurisdiction beyond the limits set by Congress.[c] This historic pattern tends to confirm that section 4B was intended as a limitation on the right created by section 4 and upon the jurisdiction which it conferred upon the District Courts.

Obviously, any tolling exception, by permitting the bringing of suits otherwise barred, would be inconsistent with this purpose of protecting the courts from stale claims. The Congressional purpose should not be frustrated by an exception it did not create or express.

4. Of course, the primary purpose of the Congress in enacting the 1955 amendments to the Clayton Act was to promote and improve the effective and efficient enforcement of the antitrust laws. As the Supreme Court pointed out in *Tigner v. State of Texas, supra,* "How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems." (310 U. S. at 148, 60 Sup. Ct. at 882.) And what constitutes effective and efficient enforcement is a problem peculiarly for the legislature. It should also be observed that effective and efficient enforcement is that enforcement which

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[c]See, *De Yturbide's Heirs v. United States,* 63 U. S. (22 How.) 290, 293, 16 L. Ed. 342 (1860), where the Supreme Court held that failure to file a required notice within the time provided by statute avoided an appeal even though there had been an express finding that the failure was wholly accidental, saying "Where an entry is required by statute, on a condition expressed, the court is bound by the statute. . . . If there be no saving in a statute, the court cannot add one on equitable grounds."

achieves the results and effects which Congress desires, and it is not necessarily that which results in the greatest possible punishment or detriment to violators or which would be most beneficial to persons injured.

For example, Congress obviously thought that permitting persons injured by violations of the antitrust laws to recover treble damages was conducive to the effective enforcement of the antitrust laws; it enacted section 4, which provided that remedy. Congress apparently also thought that facilitating such recovery by persons injured *in certain cases* also was conducive to effective enforcement; it enacted section 5(a) giving *prima facie* effect in treble damage cases to *certain* judgments obtained by the government, and it provided in section 5(b) for tolling the statute of limitations during the pendency of *some* government proceedings.

On the other hand, it is equally apparent that effective enforcement does *not* require that *every* person injured receive treble damages, or that *every* violator pay them. After all, Congress did enact a statute of limitations which should have some effect and which should inevitably bar some legitimate (but stale) claims. Furthermore, whether a person injured receives any benefit from the *prima facie* rule of section 5(a) depends upon circumstances which, to him, are entirely fortuitous and have nothing to do with the loss sustained by plaintiff or the character of the wrong committed by defendant—the circumstances of whether the final judgment is obtained by consent and before testimony or without consent or after testimony.

Congress was concerned with private plaintiffs; it was concerned with protecting the public treasury; it was concerned with defendants; it was concerned with

enforcing the antitrust laws to achieve desired economic effects; it was concerned with protecting the courts from undue congestion.

"Proposals to permit the United States to sue for damages occasioned by antitrust violations have been directed to the Congress in past years. Section 1 of the Sherman Act as originally introduced in 1890 contemplated such an action by the United States in addition to other methods of enforcing the act. The original act was amended, and subsequently rewritten omitting reference to damage suits by the Government and providing specific criminal and civil remedies by way of forfeiture. The damage suit by private parties was retained as section 7 of the Sherman Act.

"At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money.

"The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act [.] Section 5 of the Clayton Act provided that final judgments and decrees in Federal antitrust proceedings would be acceptable as prima facie evidence against defendants in private

damage suits. Section 4 of the Clayton Act simply restated the private right of action for damages contained in section 7 of the Sherman Act, but extended this right to cover all antitrust violations.

"The damages of 'persons' are trebled so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws. The United States is, of course, charged by law with the enforcement of the antitrust laws and it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of proceedings. The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of the actual damages suffered."

(*H. R. Rep. No.* 619, 84th Cong., 1st Sess., 3 [1955].)

"As previously indicated, the antitrust laws grant to private parties the right to bring a suit for treble damages to avenge injuries suffered through violations thereof. While this is a federally accorded right of action, at the present time private treble-damage cases are governed by State statutes of limitation. [footnote omitted.]

"Under this ruling a number of anomalous situations may arise. A plaintiff located in State A who is injured by a conspiracy may find himself

barred by the local statute of repose, whereas an injured party in State B, wronged by the very same collusive action, may still have a valid cause of action. While this may be unjust insofar as plaintiffs are concerned, defendants fare little better under the rule." (*Id.* at 4.)

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will tend to shorten the period over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plain-

tiff's action had been suspended by the pendency of a Government antitrust proceeding, he would be required to bring his action either (*a*) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (*b*) within 4 years after his cause of action accrued.

"The report of the Attorney General's National Committee to Study the Antitrust Laws, dated March 31, 1955, urges legislation permitting the Government the right to sue for actual damages and establishing a uniform 4 year Federal statutory limitation in antitrust actions.

"The committee is of the opinion that this legislation is necessary and therefore recommends favorable consideration of this bill, H. R. 4954." (*Id.* at 6.)

In enacting these 1955 amendments, Congress was revising the procedures for enforcement of the antitrust laws in light of all of the foregoing concerns. It attempted to balance the conflicting and inconsistent interests dictated by each of those considerations, and it produced a statute designed to promote *its* concept of effective enforcement of the antitrust laws. In this setting, the admonitions of the Supreme Court in the *Tigner* case, *supra*, that such matters are peculiarly within the legislative competence become particularly apposite.

The Supreme Court has consistently interpreted the enforcement provisions of the Sherman and Clayton Acts precisely within the confines of the language used and has refused to import by implication remedies otherwise well known to the law which might have been ap-

plicable if Congress had been silent on the matter of remedies. See, *e.g.*,

Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598 (1904);

Paine Lumber Co. v. Neal, 244 U. S. 459, 37 Sup. Ct. 718 (1917); and

United States v. Cooper Corporation, 312 U. S. 600, 61 Sup. Ct. 742 (1941).

In each of those cases the Supreme Court found and applied a Congressional intent that the exact means provided by statute constitute the sole means for enforcement of those acts.

This Court should do likewise. It should enforce the statute of limitations in sections 4B and 5(b) in accordance with the express terms of those sections.

Conclusion.

All of the foregoing, as a whole and by each of its separate parts, demonstrates that Congress intended the limitation of section 4B to be absolute, except to the limited extent specified in section 5(b), and no exceptions should be implied. No other finding of intention is consistent with any of the indicia of congressional intent: the language used, the recognized aids to construction, the purpose of the legislation, the legislative policies to be advanced, or the legislative history. All of the indicia of intent point individually to the same conclusion; collectively their compulsion is overwhelming. Congress intended that sections 4B and 5(b) be enforced according to their terms and that the limitation period thus provided *not* be tolled by concealment,

fraudulent or otherwise. If section 4B is to be amended, Congress should do it after full consideration of the consequences and in such manner as to implement its views as to what the antitrust laws should be, how they should be enforced, and the consequences to be visited upon the violator. In the meantime, this Court should enforce the law as Congress intended: section 4B must be enforced according to its terms.

The district court was wrong. Fraudulent concealment will not toll the statute of limitations in sections 4B and 5(b) of the Clayton Act. Its order must be reversed and remanded either with instructions to grant defendants' motions or for further consideration in light of a correct understanding of the law applicable to sections 4B and 5(b).

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The undersigned hereby certifies that he is specifically authorized to sign and that he does hereby sign the within and foregoing Opening Brief for Appellants on behalf of each and all of the counsel above named.

G. Richard Doty

Certificate Pursuant to Rule 18(g).

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

G. Richard Doty

APPENDIX A.

[Pub. L. 137, 84th Cong., 1st Sess. (1955).]

An Act to amend the Clayton Act by granting a right of action to the United States to recover damages under the antitrust laws, establishing a uniform statute of limitations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730), as amended, is amended by inserting at the end of section 4 the following new sections:

"Sec. 4A. Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit.

"Sec. 4B. Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

Sec. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 731; 15 U.S.C. 16), is amended to read as follows:

"Sec. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for

one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Sec. 3. Section 7 of the Act approved July 2, 1890 (26 Stat. 210), is repealed.

Sec. 4. This Act shall take effect six months after its enactment.

Approved July 7, 1955.